No. 89-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT G. CRONSON, AUDITOR GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

vs.

CHICAGO BAR ASSOCIATION and CERTAIN INDIVIDUAL MEMBERS THEREOF, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE, ROBERT L. PATTULLO, JR.; ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS; and STATE BOARD OF LAW EXAMINERS OF THE SUPREME COURT OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS THE CHICAGO BAR ASSOCIATION, DAVID C. HILLIARD, THOMAS Z. HAYWARD, JR., JOHN D. HAYES, CYNTHIA CHASE AND ROBERT L. PATTULLO, JR.

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QUESTIONS PRESENTED FOR REVIEW

These Respondents submit that this matter does not present any violation of the Due Process Clause of the United States Constitution. The Petitioner, Cronson, received a fair hearing on his Petition For Leave To Appeal to the Illinois Supreme Court.

This is the only question raised by the Petition for Certiorari. Cronson does not question the Illinois Supreme Court's denial of the Petition For Leave To Appeal on the matter of the Illinois Appellate Court's decision or the Trial Court's Judgment that monies paid by applicants and lawyers to the Board of Law Examiners and the Attorney Registration and Disciplinary Commission are not public funds and are not subject to audit by Cronson.

PARTIES TO THE PROCEEDING

Cronson fails to mention that David C. Hilliard, Thomas Z. Hayward, Jr., John D. Hayes, Cynthia Chase and Robert L. Pattullo, Jr. are respondents. Hilliard, Hayward and Hayes are attorneys practicing law in Chicago and were officers of The Chicago Bar Association (CBA) at the time this proceeding was commenced in the Circuit Court. Chase and Pattullo were applicants for admission to the Illinois Bar when this suit was commenced and are practicing attorneys in Chicago at this time. CBA is the largest urban bar association in this Country with approximately 20,000 members.

Indeed, throughout his Petition to this Court, Cronson treats this matter as litigation between the State Board of Law Examiners and the Attorney Registration and Disciplinary Commission, as agents of the Illinois Supreme Court, and himself, as Auditor General. CBA and the five respondents just named, the original plaintiffs, certainly cannot be regarded as agents of the Illinois Supreme Court and subject to its control.

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STATEMENT OF THE CASE—FACTS

There is not any dispute about the facts of this case. However, certain matters should be emphasized.

Under Rules of the Illinois Supreme Court, the Board of Law Examiners and the Attorney Registration and Disciplinary Commission are required to make and submit to the Court annual audits,—Rules 702(d) and 751(e)(b). Each agency has retained CPAs to comply with that requirement, Petition for Cert. 7. The Court has offered to make a copy of those audits available to Cronson,—letter of Chief Justice Ward to Cronson, Exhibit 2 in support of Cronson's Motion for Summary Judgment.

The financial and compliance audit which Cronson seeks to do is governed by the Audit Guide of Cronson for Performing Compliance Audits of Illinois State Agencies, dated March 15, 1985, R. 1303, Exhibit 53. That Guide has 216 single spaced pages. It provides for every possible detail which the Auditors should consider. The following paragraph from the Audit Guide sets forth the scope of the Auditors' activities, R. 1303, Exhibit 53, p. 13.

> Auditors are to be actively alert for opportunities to extend their compliance examinations into areas that normally would be considered efficiency, economy or program auditing, whenever situations arise during the ordinary course of the compliance audit which reveal the need for improvements of this type. It is the responsibility of compliance auditors to make recommendation regarding efficiency of operations and effectiveness of programs when they find needed improvements of this nature during the conduct of their compliance audit. Further, as set forth in Chapter 26, auditors are to make observations regarding auditee performance in several specific areas of management activity and be prepared to offer comments if requested by the Auditor General's Office.

Cronson testified to the breadth of an audit. He stated that "when the people making the audit arrive at the office or agency to be audited, . . . part of the records that they seek— . . . include the files of the agency", Report

of Proceedings, p. 140. "One of the guidelines or criteria of an audit under the supervision of your (Cronson's) office is that the files are open to you", Report of Proceedings, pp. 174-175 (parenthesis added).

Cronson also has been quoted as saying that the project (of the audit of the Board and Commission) would take at least six months to complete; see Chicago Daily Law Bulletin, May 30, 1980. And in an article in St. Louis Globe Democrat of October 20, 1977, Alfred H. Greening, Jr., General Counsel for Cronson's Office, is quoted as saying that the two agencies' (the Board and Commission) method of raising revenue is "invading the province of the legislature" which has sole authority for collecting revenue under the 1970 Illinois Constitution, Report of Proceedings, pp. 154, *et seq.* CBA Exhibits 1 and 2 (parenthesis added).

SUMMARY OF ARGUMENT

Cronson has presented only one argument in support of his contention that he was denied "due process" by the Illinois Supreme Court. That is that four of the Justices,—Clark, Moran, Ryan and Ward (a Majority of the Court),—were disqualified.

This Court's standard for disqualification is that a judge must have an interest in the outcome which is "direct, personal, substantial and pecuniary". None of the four Justices had such an interest. Thus Cronson's argument fails and his Petition for Certiorari should be denied. Additionally, Cronson already had received a fair hearing before the Trial Judge and the Illinois Appellate Court.

ARGUMENT

THE FOUR JUSTICES OF THE ILLINOIS SUPREME COURT,—CLARK, MORAN, RYAN AND WARD,—WERE NOT SUBJECT TO DISQUALIFICATION AND RECUSAL.

This Court has considered the matter of disqualification of judges on several occasions. In its decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), speaking through Mr. Justice Brennan, this Court said, p. 60:

> This Court held that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a *direct, personal, substantial, pecuniary interest* in reaching a conclusion against him in his case."

Later, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), through Chief Justice Burger, this Court repeated, pp. 821-822:

> In Tumey, while recognizing that the Constitution does not reach every issue of Judicial qualification, the Court concluded that "it certainly violates the Fourteenth Amendment . . . to subject (a person's) liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

and later, this Court continued, 475 U.S. 824:

> We also hold that his interest was " 'direct, personal, substantial, (and) pecuniary.' "

In *Madden, Acting Administrator v. Cronson, Auditor General*, 114 Ill. 2d 504, 501 N.E. 2d 1267 (1986), a related case, Cronson raised the same issues and the Illi-

nois Supreme Court followed the foregoing decisions. This Court denied certiorari, 484 U.S. 818 (1987).

That was an original suit for *Mandamus* to require Cronson to audit funds appropriated by the General Assembly to the Court for operation of the Court System. It excluded the records and monies of the Board and the Commission. In that matter, Cronson filed a special and limited appearance and motion to dismiss "for want of jurisdiction based on due process grounds". He contended that the Illinois Supreme Court was disqualified and lacked jurisdiction because "it would be trying its own case in violation of his due process rights" and because it had "prejudged, adversely to him, an issue of his auditing authority which is inseparably related to the issue in this cause" (the *Mandamus*). The Illinois Supreme Court denied that Motion.

Cronson did not file any further motion or response. Neither he nor his counsel appeared for oral argument. The Illinois Supreme Court ordered the issuance of the writ. This Court denied certiorari, 484 U.S. 818.

In its opinion, the Illinois Supreme Court discussed Cronson's motion to dismiss "for want of jurisdiction based on due process grounds". The Court said, 114 Ill. 2d 504, 501 N.E. 2d 1267, 1271:

> Although not previously presented to this court, the Supreme Court in recent years has, on several occasions, considered the question of the nature and extent of the interest required to render a judge's failure to recuse himself a violation of due process. (Aetna Life Insurance Co. v. Lavoie (1986), ___ U.S. ____, 89 L. Ed. 2d 823, 106 S. Ct. 1580.) The rule distilled from the opinions is that the interest is violative of due process if it is "direct, personal, substantial, (and) pecuniary." (Ward v. Village of Monroe-

> ville (1972), 409 U.S. 57, 60, 34 L. Ed. 2d 267, 270, 93 S. Ct. 80, 83.) Applying either that test or the less stringent one advocated by Mr. Justice Brennan in his concurring opinion in Aetna Life Insurance Co. v. Lavoie, we hold that the judges of this court do not have an interest sufficiently direct or substantial so that their participation in the decision of this case is violative of due process.
>
> The decision of the court to direct the Board and Commission to refuse to permit defendant to audit their respective accounts, upon which defendant's assertions of "prejudgment" and "bias" were based, was made in the course of the court's exercise of its authority to regulate the admission and discipline of the bar, and not as a decision in pending litigation. That decision, unlike the decision in United States v. Will (1980), 449 U.S. 200, 66 L. Ed. 2d 392, 101 S. Ct. 471, has no pecuniary effect on the individual justices of this court, and we are not persuaded that any member of the court, if the relevant authorities indicate otherwise, feels compelled to reach the same conclusion in a judicial proceeding as that reached in a prior administrative decision.

During the pendency of the *Mandamus* proceeding, Cronson filed, in the United States District Court in Springfield, Illinois, a proceeding for an injunction against the Justices of the Illinois Supreme Court, Madden and the Clerk of the Court to restrain further action in the *Mandamus* matter. The District Judge denied the Motion for an injunction and later dismissed the suit. The Federal Court of Appeals affirmed and this Court denied *certiorari*, 645 F. Supp. 793, 810 F.2d 662, *cert. denied*, 484 U.S. 871 (1987). In its opinion, the Court of Appeals, through Mr. Justice Posner, said:

> Although the appeal is not moot, the case is so clearly outside the cognizance of the federal courts that

> no purpose would be served by setting the appeal for argument in the ordinary course. This is not to say that Cronson's position has no merit as a matter of state law; that is a question on which we express no view. His dispute simply has no place in a federal court.

On consideration of the foregoing authorities, Clark, Moran, Ryan and Ward were not subject to disqualification and recusal. Cronson's due process arguments fail.

Of persuasion to the Illinois Supreme Court may have been its earlier opinion in *Barco Manufacturing Company v. Wright*, 10 Ill. 2d 157, 139 N.E. 2d 227 (1956). That case involved contributions under the Illinois Unemployment Compensation Act by employers with the State Treasurer. He deposited them with the United Sates Treasury until they were requisitioned for payment of benefits to unemployed workers. The Illinois Supreme court decided that the contributions were not "public funds" but "trust funds". It emphasized that the monies in question were not those raised by taxation and deposited in the general revenue or similar fund for disbursement by appropriation of the General Assembly.

Cronson argues that the Illinois Supreme Court improperly used the Rule of Necessity, Petition for Certiorari, 21, 24. This is a misconception. We repeat what that Court said in *Madden, supra*, 114 Ill. 2d 504, 501 N.E. 2d 1267.

> If there were any merit to defendant's contention, we would be required to consider the applicability of the common law rule of necessity. (See United States v. Will (1980), 449 U.S. 200, 66 L. Ed. 2d 392, 101 S. Ct. 471.) Because we find the contention to be without merit, we perceive no need to discuss the rule of necessity.

CONCLUSION

Cronson's due process contention is untenable. He has not made any other argument. His Petition for Certiorari should be denied.

Respectfully submitted,

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